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James Jeffery & Ors v Public Prosecutor and another case

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HIGH COURT (SANDAKAN) — CRIMINAL APPEAL NOS SDK-42H-1/12 OF 2020 AND SDK-42H-2/12 OF 2020
CELESTINA STUEL GALID J
23 APRIL 2021

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Criminal Procedure — Appeal — Appeal against sentences — Appellant charged with offences under s 372(1)(f) of Penal Code and s 14 of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 — Appellant pleaded guilty and sentenced to seven years imprisonment and five strokes of whipping; and ten years imprisonment and RM10,000 fine or in default thereof, nine months imprisonment — Whether sentence was manifestly excessive

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The appellant was charged with an offence under s 372(1)(f) of the Penal Code and another offence under s 14 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. Following the appellant's guilty pleas, the sessions court convicted the accused and sentenced him to seven years imprisonment and five strokes of whipping for the first charge and ten years imprisonment and RM10,000 fine or in default thereof, nine months imprisonment for the second charge. The imprisonment terms were ordered to run concurrently. The appellant appealed against the sentences. The appellant had submitted, inter alia, that: (a) the trial judge did not have the opportunity to hear and sufficiently appreciated the appellant's mitigating factors before the sentencing; (b) the trial judge had failed and had not sufficiently appreciated that the sentence imposed was not in line with the sentencing trend; and (c) the trial judge had erred in law and in fact in sentencing the appellant and that the sentence at hand was excessive. The appellant purported to introduce new evidence in support of his contentions on the mitigating factors by way of a 'core bundle'. These included documents such as his birth certificate, identification cards of the appellant and his father, documents showing the intended marriage between the appellant and his fiancee and antenatal medical records showing the pregnancy of the appellant's fiancee.

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Held, dismissing the appeals:

(1) The nature of the documents sought to be produced were only for mitigating purposes, hence, did not come within the exceptional circumstances (see para 21).

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(2) It was of no consequence that the appellant was described as a 'young offender'. The appellant did not fall within the definition of a 'youthful offender' under s 2(1) of the Criminal Procedure Code. In addition, the

court did not modify a sentence on the husband merely because the wife and family, or prospective family would suffer. That by itself could not be a paramount factor for consideration in the offences committed by the appellant. The mitigating factors must be weighed against the public interest for a deterrent sentence and that the mitigating factors submitted for the appellant paled in comparison (see paras 25–27 & 31).

(3) An imprisonment sentence of say six years would be only a mere slap on the wrist for the appellant as one third of that six years might be further reduced on remission under s 44(1) of the Prison Act 1995, leaving the appellant to serve about four years and six months only. This could hardly qualify as a deterrent sentence (see para 38).

(4) The role played by the appellant was not so minimal. The appellant's role was more dominant. Therefore, there was no merit in the submissions by the appellant (see paras 41 & 44–45).

(5) The court should not be constrained to follow the trend of sentencing as in the cases cited by the appellant. The concurrent imprisonment terms were not manifestly excessive. There was nothing to suggest that the sentences were not in accordance with the law (see para 51).

[Bahasa Malaysia summary

Perayu didakwa dengan kesalahan di bawah s 372(1)(f) Kanun Keseksaan dan satu lagi kesalahan lain di bawah s 14 Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007. Susulan pengakuan bersalah perayu, mahkamah sesyen mensabitkan tertuduh dan menjatuhkan hukuman penjara tujuh tahun dan lima sebatan bagi pertuduhan pertama dan sepuluh tahun penjara dan denda RM10,000 atau jika ingkar, penjara sembilan bulan bagi pertuduhan kedua. Tempoh penjara diperintahkan berjalan serentak. Perayu merayu terhadap hukuman tersebut. Perayu telah mengemukakan, antara lain, bahawa: (a) hakim bicara tidak berpeluang mendengar dan menghargai secara secukupnya faktor mitigasi perayu sebelum hukuman; (b) hakim bicara telah gagal dan tidak secara secukupnya menghargai bahawa hukuman yang dikenakan tidak selaras dengan trend hukuman; dan (c) hakim bicara telah terkhilaf dari segi undang-undang dan fakta dalam menjatuhkan hukuman kepada perayu dan bahawa hukuman yang dikenakan adalah berlebihan. Perayu mencadangkan untuk memperkenalkan keterangan baharu bagi menyokong hujahannya mengenai faktor mitigasi melalui 'core bundle'. Ini termasuk dokumen seperti sijil kelahirannya, kad pengenalan perayu dan bapanya, dokumen yang menunjukkan perkahwinan yang dimaksudkan antara perayu dan tunangnya dan rekod perubatan antenatal yang menunjukkan kehamilan tunang perayu.

Diputuskan, menolak rayuan:

(1) Sifat dokumen yang ingin dikemukakan adalah hanya untuk tujuan

mitigasi, oleh itu, tidak termasuk dalam keadaan luar biasa (lihat perenggan 21).

(2) Tiada kesan bahawa perayu disifatkan sebagai 'pesalah muda'. Perayu tidak termasuk dalam takrifan 'pesalah muda' di bawah s 2(1) Kanun Prosedur Jenayah. Di samping itu, mahkamah tidak mengubahsuai hukuman ke atas suami semata-mata kerana isteri dan keluarga, atau bakal keluarga yang akan menderita. Itu dengan sendirinya tidak boleh menjadi faktor utama untuk pertimbangan dalam kesalahan yang dilakukan oleh perayu. Faktor-faktor mitigasi mesti ditimbang dengan kepentingan awam untuk hukuman pencegahan dan faktor-faktor mitigasi yang dikemukakan untuk perayu kurang dalam perbandingan (lihat perenggan 25–27 & 31).

(3) Hukuman penjara seperti enam tahun hanya akan menjadi ringan sahaja bagi perayu kerana satu pertiga daripada enam tahun itu mungkin akan dikurangkan lagi dengan peremitan di bawah s 44(1) Akta Penjara 1995, meninggalkan perayu untuk berkhidmat kira-kira empat tahun enam bulan sahaja. Ini hampir tidak layak sebagai hukuman pencegahan (lihat perenggan 38).

(4) Peranan yang dimainkan oleh perayu tidaklah begitu minima. Peranan perayu adalah lebih dominan. Oleh itu, tiada merit dalam penghujahan oleh perayu (lihat perenggan 41 & 44–45).

(5) Mahkamah tidak seharusnya dibataskan untuk mengikuti trend menjatuhkan hukuman seperti dalam kes yang dirujuk oleh perayu. Pemenjaraan serentak tidak terlalu berlebuhan. Tiada apa-apa yang menunjukkan bahawa hukuman itu tidak mengikut undang-undang (lihat perenggan 51).]

Cases referred to

Adam bin Atan v PP [2008] MLJU 402; [2009] 1 CLJ 33, CA (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Lo Fat Thjan & Ors v PP [1968] 1 MLJ 274, FC (refd)
Mikail Tan Abdullah v PP [2019] MLJU 1184; [2019] 1 LNS 1561, HC (refd)
Mohamad Jamil bin Che Din & Anor v PP [2014] 2 MLJ 98, CA (refd)
Mohamad Nizam Mohamad Selihin & Anor v PP [2018] MLJU 1624; [2018] 1 LNS 67, HC (refd)
Mohamed bin Jamal v PP [1964] MLJ 254, HC (refd)
Muhammad Fikri Aslam bin Ishak dan satu lagi lwn Pendakwaraya [2019] MLJU 772; [2019] 1 LNS 1113, HC (refd)
Pendakwa Raya v Asmarani binti Ghazali [2019] MLJU 1719, CA (refd)
Pendakwa Raya v Heng Chun Sim [2015] MLJU 2345, SC (refd)
Pendakwa Raya v Lee Chee Kien [2007] MLJU 479; [2007] 1 LNS 370, HC (refd)
PP v Ling Leh Hoe [2015] MLJU 1006; [2015] 4 CLJ 869, CA (refd)

PP v Mohamed Danny Mohamed Jedi [2018] 6 MLJ 383; [2018] 5 CLJ 692, CA (refd)
PP v Mohammed Syeed Mallik [2007] SGCA 48, CA (refd)
PP v Ravindran [1993] 1 MLJ 45, HC (refd)
PP v Shahrul Azuwan bin Adanan & Anor [2013] 8 MLJ 70, HC (refd)
PP v Yap Koon Mong [1999] 4 SLR 257, CA (refd)
R v Ipeelee [2012] SCC13 ; [2012] 1 SLR 433, SC (refd)
R v Millberry [2003] 1 Cr App R 396, CA (refd)
R v Parks [1961] 3 All ER 633 (refd)
Sugumaran Kannan v PP [2007] 3 MLJ 121; [2006] 8 CLJ 644, HC (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 14
Criminal Procedure Code s 317
Penal Code ss 293(1), 372(1)(f)
Prison Act 1995 s 44(1)

Wesley Chang (Ibrahim & Chang) for the appellant.
Mark Kenneth Netto (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Celestina Stuel Galid J:

INTRODUCTION

[1] The appellant who was charged with two others had pleaded guilty in the sessions court to the following charges:

> 1st charge:
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> Bahawa kamu bersama-sama, di antara 28.08.2020 hingga 06.09.2020 bertempat di Lot 1740, Blok 169, Taman Indah Jaya, Sandakan, dalam Daerah Sandakan, di dalam Negeri Sabah, telah didapati menjadi orang tengah dengan menawarkan hubungan seks dengan bayaran RM150 untuk sekali perkhidmatan seks bagi maksud persundalan XXX dan YYY dengan pelanggan yang dilanggani. Oleh itu, itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 372(1)(f) Kanun Keseksaan dan dibacakan bersama Seksyen 34 Kanun Keseksaan.
>
> 2nd charge:
>
> Bahawa kamu bersama-sama, di antara 28.08.2020 hingga 06.09.2020 bertempat di Lot 1740, Blok 169, Taman Indah Jaya, Sandakan, dalam Daerah Sandakan, di dalam Negeri Sabah, telah memperdagangkan seorang kanak-kanak iaitu ZZZ (No Sijil Lahir SB ******) bagi maksud eksploitasi dalam kegiatan pelacuran. Oleh itu, itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 14 Akta Antipermerdagangan Orang dan Antipenyeludupan Migran 2007 dan dibacakan bersama Seksyen 34 Kanun Keseksaan.

[2] The sessions court convicted the accused upon his guilty pleas and sentenced him to seven years imprisonment and five strokes of whipping for the first charge and ten years imprisonment and RM10,000 fine or in default thereof, nine months imprisonment for the second charge. The imprisonment terms were ordered to run concurrently.

[3] It was against these sentences that the appellant has appealed to this court.

[4] The appeals were heard together and on 5 April 2021, this court dismissed both appeals and affirmed the sentences imposed by the sessions court.

[5] The appellant has now filed notices of appeal against the dismissal of his appeals, for which these grounds are provided for.

ADMITTED FACTS (EXH 'P1')

[6] When pleading guilty to the charges, the appellant had admitted to the facts of the case tendered by the prosecution. They are reproduced verbatim below.

> 1st charge:
>
> Pada 07.09.2020 jam 1530 hrs, pengadu telah mengetuai sepasukan polis dari Bahagian Siasatan Jenayah, IPD Sandakan telah membuat serbuan di alamat Lot 1740, Block 169, Taman Indah Jaya, Sandakan. Apabila sampai di rumah tersebut, pasukan serbuan dapati pintu grill hadapan rumah berkunci dan pasukan serbuan bertindak memecahkan kendadu sebelum masuk ke dalam rumah. Dalam serbuan tersebut telah menangkap tertuduh penama James Jeffrey, Yusdar Bin Hamzah dan Abdul Bin Mamin dan menyelamatkan dua wanita yang dilacurkan iaitu penama XXX dan YYY serta merampas tiga keping kondom, wang tunai, kad catitan pekerja, beberapa buah telefon bimbit dan sebuah kenderaan pick-up jenis Isuzu Dmax.
>
> Hasil siasatan mendapati, di antara Tarikh 28.08.2020 hingga 06.09.2020 bertempat di sebuah rumah di alamat Lot 1740, Block 169, Taman Indah Jaya, Sandakan, ketiga-tiga tertuduh iaitu James Jeffrey, Yusdar Bin Hamzah dan Abdul Bin Mamin di dapati telah menjadi orang tengah dengan menawarkan hubungan seks bagi maksud persundalan penama XXX dan YYY dengan pelanggan yang dilanggani dalam kegiatan pelacuran. Ketiga-tiga tertuduh iaitu penama James Jeffrey, Yusdar Bin Hamzah dan Abdul Bin Mamin berperanan mencari pelanggan dengan bayaran RM150 setiap seorang melalui aplikasi 'Mi Chat' untuk dilayan secara seks oleh kedua-dua wanita iaitu penama XXX dan YYY. Tertuduh Yusdar Bin Hamzah dan Abdul Bin Mamin juga berperanan menjaga dan mengawal XXX dan YYY di rumah tersebut.

Pada 07.09.2020, bertempat di lokasi kejadian, pegawai penyiasat kes iaitu ASP Sharanjeit Singh telah membuat lakaran rajah kasar tempat kejadian dan Kpl Shariz Suresh Bin Mustaffa Sekeran telah mengambil 28 keping gambar di lokasi kejadian.

Pada 12.09.2020 dan 13.09.2020, bertempat di pejabat Jabatan Siasatan Jenayah, IPD Sandakan, Kpl Shariz Suresh Bin Mustaffa Sekeran telah mengambil 17 keping gambar barang kes.

Pada 12.09.2020, bertempat di pejabat Jabatan Siasatan Jenayah, IPD Sandakan, Kpl Shariz Suresh Bin Mustaffa Sekeran telah mengambil 92 keping gambar 'Screen Shot Group Whatsapp Bisnis Dollar* yang dianggotai oleh tertuduh penama James Jeffrey dan dua lagi rakannya iaitu Choong Boon Seng dan Jamlee Bin Joinin. 'Group' ini diwujudkan untukperbincangan serta 'update' berkaitan kegiatan ini. Dua rakan tertuduh iaitu Choong Boon Seng dan Jamlee Bin Joinin ada memberikan dana berupa wang tunai sebagai modal untuk tertuduh James Jeffrey memulakan kegiatan ini.

Oleh yang demikian, ketiga-tiga tertuduh telah melakukan satu kesalahan yang boleh di hukum di bawah Seksyen 372 (1)(f) Kanun Keseksaan dan dibacakan bersama Seksyen 34 Kanun Keseksaan kerana menjadi orang tengah dengan menawarkan hubungan seks bagi maksud persundalan penama XXX dan YYY dengan pelanggan yang dilanggani dalam kegiatan pelacuran.

2nd charge:

Pada 07hb September 2020 jam 1335 hrs, mangsa A1 @ pengadu @ mangsa iaitu penama ZZZ telah datang ke Balai Polis Sandakan dan membuat laporan polis serta memberikan maklumat berkaitan kegiatan pelacuran secara paksa oleh empat orang lelaki yang melibatkan pengadu dan dua lagi wanita di sebuah rumah di Taman Indah Jaya, Sandakan.

Pada 07.09.2020 jam 1400 hrs, bertempat di Balai Polis Sandakan, sepasukan polis dari Jabatan Siasatan Jenayah, IPD Sandakan telah menyelamatkan mangsa kerana dipercayai telah dieksploitasi dalam kegiatan pelacuran.

Pada 07.09.2020 jam 1530 hrs, dengan dipandu arah oleh mangsa, sepasukan polis dari Jabatan Siasatan Jenayah, IPD Sandakan telah membuat serbuan di alamat Lot 1740, Block 169, Taman Indah Jaya, Sandakan. Apabila sampai di rumah tersebut, pasukan serbuan dapati pintu grill hadapan rumah berkunci dan pasukan serbuan bertindak memecahkan kendadu sebelum masuk ke dalam rumah. Serbuan tersebut telah menangkap tertuduh penama James Jeffrey, Yusdar Bin Hamzah dan Abdul Bin Mamin serta merampas tiga keping kondom, wang tunai, kad catitan pekerja, beberapa buah telefon bimbit dan sebuah kenderaan pick-up jenis Isuzu Dmax.

Hasil siasatan mendapati di antara Tarikh 28.08.2020 hingga 06.09.2020 bertempat di sebuah rumah di alamat Lot 1740, Block 169, Taman Indah Jaya, Sandakan, ketiga-tiga tertuduh iaitu penama James Jeffrey, Yusdar Bin Hamzah dan Abdul Bin Mamin didapati telah memperdagangkan mangsa ZZZ iaitu seorang kanak-kanak berumur 16 tahun dengan maksud eksploitasi dalam kegiatan pelacuran. Tertuduh penama Yusdar Bin Hamzah dan Abdul Bin Mamin berperanan mencari pelanggan dengan bayaran RM 150 setiap seorang melalui

aplikasi 'Mi Chat' untuk dilayan secara seks oleh mangsa. Ketiga- tiga tertuduh juga berperanan menjaga dan mengawal mangsa di rumah tersebut. Sepanjang tempoh tersebut juga, mangsa dikehendaki membuat bayaran RM 300 setiap hari hasil daripada pendapatannya melayani pelanggan kepada tertuduh James Jeffrey sebagai bayaran harian. Sekiranya mangsa gagal mendapatkan pelanggan dan tidak dapat membuat bayaran hari tersebut, ia akan dikira sebagai hutang dan akan di bawa kehadapan sebagai hutang tertunggak. Mangsa juga dijanjikan dengan bayaran 1,000 sebagai gaji bulanan oleh tertuduh James Jeffrey. Walau bagaimanapun, mangsa tidak pernah menerima sebarang bayaran atau imbuhan daripada tertuduh James Jeffrey atau dua tertuduh lain iaitu Yusdar Bin Hamzah dan Abdul Bin Mamin.

Pada 07.09.2020, bertempat di lokasi kejadian, pegawai penyiasat kes iaitu ASP Sharanjeit Singh telah membuat lakaran rajah kasar tempat kejadian dan Kpl Shariz Suresh Bin Mustaffa Sekeran telah mengambil 28 keping gambar di lokasi kejadian.

Pada 12.09.2020 dan 13.09.2020, bertempat di pejabat Jabatan Siasatan Jenayah, IPD Sandakan, Kpl Shariz Suresh Bin Mustaffa Sekeran telah mengambil 17 keping gambar barang kes.

Pada 12.09.2020 bertempat di pejabat Jabatan Siasatan Jenayah, IPD Sandakan, Kpl Shariz Suresh Bin Mustaffa Sekeran telah mengambil 92 keping gambar 'Screen Shot Group Whatsapp Bisnis Dollar* yang dianggotai oleh tertuduh penama James Jeffrey dan dua lagi rakannya iaitu Choong Boon Seng dan Jamlee Bin Joinin. 'Group'ini diwujudkan untukperbincangan serta 'update' berkaitan kegiatan ini. Dua rakan tertuduh iaitu Choong Boon Seng dan Jamlee Bin Joinin ada memberikan dana berupa wang tunai sebagai modal untuk tertuduh James Jeffrey memulakan kegiatan ini.

Oleh yang demikian, ketiga-tiga tertuduh telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 14 Akta Anti Pemerdagangan Orang dan Penyeludupan Migran 2007 (Akta 670) dan dibacakan bersama Seksyen 34 Kanun Keseksaan kerana telah memperdagangkan mangsa ZZZ iaitu seorang kanak-kanak berumur 16 tahun dengan maksud eksploitasi dalam kegiatan pelacuran.

THE GROUNDS OF APPEAL

[7] The appellant had submitted the same grounds of appeal in both appeals, reproduced below:

(a) the Honourable Judge did not have the opportunity to hear and sufficiently appreciated the Appellant's mitigating factors before the sentencing, such as his age, his employment and his family background, as the Appellant did not have the opportunity to appoint his own counsel in time to mitigate on his behalf;

(b) the Honourable Judge had failed and had not sufficiently appreciated that the Appellant is of young age of 23 on the day of conviction and therefore should be given a shorter sentence and a better chance to rehabilitate himself and turn his life around so as to prevent him from becoming a hardened criminal;

(c) the Honourable Judge had failed and had not sufficiently appreciated that the Appellant is a functioning member of society after having taken up a few honest jobs before this;

(d) the Honourable Judge had failed and had not sufficiently appreciated that during the time of this Covid 19 pandemic, the Appellant's parents, his sister and his fiance are all out of job and work, and his family is very dependent on him to work and provide for the family;

(e) the Honourable Judge had failed and had not sufficiently appreciated that the Appellant and his family are not of a well to do background, and that the Appellant had committed the crime at hand to make end meets for him and his family, especially considering that the Appellant and his family were financially strained and were struggling to get by due to the downturn of the economy caused by the Covid 19 pandemic;

(f) the Honourable Judge had failed and had not sufficiently appreciated that at the time of the Appellant's conviction and sentence, the Appellant's fiance was pregnant and that the Appellant was about to be a father to a child, of which meant that the Appellant should have been given a shorter sentence considering that on humanitarian grounds, the Appellant's fiance and the said child should not be denied and deprived of their respective future husband father for too long;

(g) the Honourable Judge had failed and had not sufficiently appreciated that the Appellant's level of involvement in the crime he was charged with, is that of a money collector and the person in charge of corresponding with the ring leaders, Choong Boon Seng and Jamlee Bin Joinin, and that unlike his co-accused, the Appellant was never actively involved in soliciting clients and/or customers;

(h) based on the facts of the cases which had been tendered by the Prosecution, agreed by the Appellant and accepted by the Court, the trial Judge had failed to consider that there is nothing which would point to the fact that over the course of the crime being committed at hand, the victims involved were ever physically abused and/or hurt, and neither were they forced by way of threat of violence or any other form of threats into being involved in the crime which would warrant the Court to impose a lesser sentence; and

(i) the Honourable Judge had failed and had not sufficiently appreciated that the fact that the sentence imposed by his Honour was not in line with the sentencing trend for the offence committed by the Appellant.

(j) The trial Judge in the whole circumstance of the case has erred in law and in fact in sentencing the Appellant in respect of said charge at hand and that the sentence at hand is excessive.

PRINCIPLES ON APPELLATE INTERVENTION

[8] At the risk of stating what is trite law, a court in exercising its appellate jurisdiction when dealing with an appeal against sentence may only do so in limited circumstances. These circumstances have been identified by the Court of Appeal in *Public Prosecutor v Ling Leh Hoe* [2015] MLJU 1006; [2015] 4 CLJ 869 as follows:

(a) the sentencing judge had made a wrong decision as to the proper factual basis for the sentencing;

(b) there had been an error on the part of the trial judge in appreciating the material facts placed before him;

(c) the sentence was wrong in principle; or

(d) the sentence imposed was manifestly excessive or inadequate.

[9] That the appellate court would have imposed a lesser sentence is irrelevant unless the appellant satisfies the court that the lower court has erred in principle and imposed a manifestly excessive sentence — see *Adam bin Atan v Public Prosecutor* [2008] MLJU 402; [2009] 1 CLJ 33.

[10] The statement by Raja Azlan Shah Ag LP in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 has also offered a time tested guideline to appellate courts dealing with appeals against sentences:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525 at p 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentence, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.
>
> For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some

A unauthorised or extraneous or irrelevant exercise of discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false B testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardians of the public interest (see the *Exclusive Brethren case* [1980] 3 All ER 161 at p 172).

THIS COURT'S DECISION

C

[11] It would be useful to first set out the provisions under which the appellant was charged.

[12] Section 372(1)(f) of the Penal Code provides that:

D

(1) Whoever —

(f) acts as an intermediary on behalf of another or exercises control or influence over the movements of another in such a manner as to show that the person is aiding or abetting or controlling the prostitution of that other, shall be punished with E imprisonment for a term which may extend to fifteen years and with whipping, and shall also be liable to fine.

[13] Section 14 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act') provides that:

F

Any person, who traffics in persons being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.

G

[14] It was apparent from the court's reading of the petitions of appeal that save for the ground on the trend of sentencing and the proportionality of the sentence to the offence, the rest of the grounds of appeal revolved around the appellant himself.

H

[15] It was submitted for the appellant that had the mitigating factors been properly brought to the attention of the sessions court, it would have resulted in a lower sentence. However, the appellant was unrepresented then.

I **[16]** The appellant purported to introduce new evidence in support of his contentions on the mitigating factors by way of a 'Core Bundle' (encl 15). These included documents such as his birth certificate, identification cards of the appellant and his father, documents showing the intended marriage between the appellant and his fiancee and antenatal medical records showing

the pregnancy of the appellant's fiancee.

[17] Learned counsel for the appellant cited the case of *Mikail Tan Abdullah v Public Prosecutor* [2019] MLJU 1184; [2019] 1 LNS 1561 to contend that the court may exercise its discretion to allow the new evidence without a formal application. In that case, Judicial Commissioner Christopher Chin allowed the application by the appellant to adduce statutory declarations and police reports by the family members of the appellant. By the statutory declarations, the deponents retracted their police reports against the appellant on the basis that they were lodged as a result of family misunderstanding.

[18] With respect, the present appellant's reliance on *Mikail Tan Abdullah v Public Prosecutor* was misguided. There, the prosecution had not objected to the documents being adduced. This is to be contrasted from the present case.

[19] Learned deputy public prosecutor ('DPP') objected to the appellant's reliance on these documents, submitting that the appellant had not made a proper or formal application to adduce the said documents. Further, learned DPP submitted that the appellant had not satisfied the cumulative conditions for the introduction of new evidence as propounded in the case of *R v Parks* [1961] 3 All ER 633 namely that:

(a) the evidence sought to be called must be evidence which was not available at the trial;

(b) the evidence must be relevant to the issue;

(c) it must be credible evidence in the sense of being well capable of belief;

(d) the court, will, after considering that evidence go on to consider whether there has been a reasonable doubt in the minds of the jury as to guilt of the appellant if that evidence had been given together with the other evidence at the trial.

[20] In addition, the court in *Mikail Tan Abdullah v Public Prosecutor* took the view that the effect of the retraction of the police reports vide the statutory declaration was that there was no longer a case against the appellant. With his guilty plea and conviction, it could not be said the same for the appellant in the present case.

[21] Having regards to s 317 of the Criminal Procedure Code ('the CPC') and decided cases (see *Mohamad Jamil bin Che Din & Anor v Public Prosecutor* [2014] 2 MLJ 98 and *Mohamed bin Jamal v Public Prosecutor* [1964] MLJ 254) this court upheld the objection by the learned DPP. This court was of the view that the nature of the documents sought to be produced were only for mitigating purposes, hence, did not come within the exceptional

circumstances as laid down by the Federal Court in *Lo Fat Thjan & Ors v Public Prosecutor* [1968] 1 MLJ 274. As will be seen in the discussion below, these purported mitigating factors would not have persuaded this court in any event.

MITIGATING FACTORS

[22] Visu Sinnadurai J stated in *Public Prosecutor v Ravindran* [1993] 1 MLJ 45 that:

> In this regard, a plea in mitigation, cannot be merely a statement of the accused antecedent and family background. It must, like a submission, be interspersed with relevant authorities.
>
> The following two comments on the role of advocates in presenting a plea in mitigation, may be of relevance. The following observation was made by Judge Frankel in *Criminal Sentences: Law Without Order* (1973):
>
> > The usual defence lawyer's statement pleads for compassion, stressing the defendant's virtues, if any; family ties; the good opinions of employers, teachers and the like. Such things are relevant to be sure. They appear, however, neither to be novel nor wholly accurate.
>
> He added that a good lawyer for the defence would be one who:
>
> had made the sentencing problem a subject of genuine study; has managed effectively to size up the judge and his concerns; and succeeds in proposing an appropriate, imaginative, and sensible sentence that appears genuinely to serve both the client's and the public interests.

[23] It was submitted for the appellant that the appellant was a young offender at the time of his conviction, being only 23 years old then. He was the only son and the youngest of two siblings. At the time of his arrest, he was the only breadwinner for the family, his sister having lost her job as a language tutor due to the Covid-19 pandemic.

[24] It was further submitted that the appellant was engaged to be married to his fiancee who was at the time, was pregnant with his child. At the time of these appeals, his fiancee had already given birth to a girl. The court was implored not to deny the appellant's fiancee and their daughter of the appellant's presence in their lives by the lengthy imprisonment term.

[25] Firstly, it was of no consequence that the appellant was described as a 'young offender' by his learned counsel. The law does not recognise such definition. By s 2(1) read with s 293(1) of the CPC, the law allows for court's discretion when imposing sentencing on an accused who is above 18 and under 21 years of age at the time of conviction. However, the appellant did not fall within the definition of a 'youthful offender' under s 2(1) of the CPC.

[26] The appellant had pleaded for leniency on the ground that he had just became a father. It was of no doubt that the tragedy of the appellant's criminal act had befallen not only to the victims but also to his new born child. But the court does not modify a sentence on the husband merely because the wife and family, or prospective family will suffer — see *Public Prosecutor v Yap Koon Mong* [1999] 4 SLR 257. In *Yap Koon Mong,* the Singapore Court of Appeal referred with approval the following judgment of Lord Widgery CJ in *R v Ingham* (Eng, CA (Cr D), 3 October 1974, unreported):

> ... it is not altogether an easy case, but of course this always happens, time and time again, that imprisonment of the father inevitably causes hardship to the rest of the family. If we were to listen to this kind of argument regularly and normally in the cases that come before us, we should be considering not the necessary punishment for the offender but the extent to which his wife and family might be prejudiced by it. The crux of the matter is that part of the price to pay when committing a crime is that imprisonment does involve hardship on the wife and family, and it cannot be one of the factors which can affect what would otherwise be the right sentence.

[27] While it tugged the court's heart that a young child should be without the presence of her father in the first ten years of her life, that by itself could not, in my mind, be a paramount factor for consideration in the offences committed by the appellant.

[28] As for the other mitigating factors referred to by the appellant, this court found much guidance in the statement by Abdul Rahman bin Sebli J (now FCJ) in *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70 that:

> [14] The sentencing court must only consider circumstances that mitigate the crime and not those that are personal to the offender and unconnected to the crime such as hardship to the offender and his family if he is sent to prison. These are matters that the offender should have thought of before committing the offence. If he was brave enough to tempt fate and got caught he must be brave enough to face the natural and probable consequences of his act. But if for any valid reason there is a need to temper justice with mercy a proper balance has to be struck between sympathy for the offender and the pain and suffering that he had inflicted on his victim or the damage that his criminal activity had done to society.

[29] The gist of the mitigating factors put forward by the appellant seemed to suggest that the appellant has a whole life waiting for him, his fiancee waiting to marry him, his child waiting to see him. To this, the court wondered what life that 16 year old girl would have ahead of her had she not been trafficked and used as a commodity for a 'business' to derive income for the appellant and his cohort. However, the appellant's submissions conveniently offered no thoughts as to the life of those affected in particular the child victim, a 16 year old.

[30] This court had identified that a possible mitigating factor in the circumstances of this case would have been had the monies received from the prostitution were wholly given to the victims so that they were able to better off their lives. However, the following admitted facts of the case showed otherwise:

> Sepanjang tempoh tersebut juga, mangsa dikehendaki membuat bayaran RM 300 setiap hari hasil daripada pendapatannya melayani pelanggan kepada tertuduh James Jeffrey sebagai bayaran harian. Sekiranya mangsa gagal mendapatkan pelanggan dan tidak dapat membuat bayaran hari tersebut, ia akan dikira sebagai hutang dan akan di bawa kehadapan sebagai hutang tertunggak. Mangsa juga dijanjikan dengan bayaran 1,000 sebagai gaji bulanan oleh tertuduh James Jeffrey. Walau bagaimanapun, mangsa tidak pernah menerima sebarang bayaran atau imbuhan daripada tertuduh ...

[31] Additionally, the mitigating factors must be weighed against the public interest for a deterrent sentence and as will be shown below, the mitigating factors submitted for the appellant paled in comparison.

PUBLIC INTEREST

[32] The starting point when discussing on the issue of public interest in this case is the intention of Parliament when legislating the Act — see *Pendakwa Raya v Asmarani binti Ghazali* [2019] MLJU 1719.

[33] The preamble to the Act describes the Act as:

> An Act to provide for certain sexual offences against children and their punishment in addition to other sexual offences against children and their punishment in other written laws, and in relation to it to provide for the administration of justice for children and connected matters.

[34] When debating the bill on the Act, the then Minister in the Prime Minister's Department was reported in the Hansard (see *'Rang Undang-Undang Antipemerdagangan Orang 2007'* DN.24.5.2007 at p 35) to have stated:

> Tuan Yang di-Pertua, berdasarkan laporan tahunan pemerdagangan orang yang diterbitkan oleh dengan izin *Office Monitor to Combat Trafficking in Persons, United States Department of State* pada 5 Jun 2006, Malaysia ditempatkan pada tingkat kedua senarai pengawasan dengan izin, *two tier watch list.* Keputusan untuk menempatkan Malaysia pada tingkat kedua senarai pengawasan adalah kerana Malaysia dilihat tidak bersungguh-sungguh dalam usaha untuk menangani dan memerangi masalah pemerdagangan orang, khususnya dengan ketiadaan undang-undang domestic yang spesifik dan komprehensif untuk menangani masalah ini.

[35] The said minister further explained the reasoning behind the proposed

sentences under the new Act:

> Tuan Yang di-Pertua, hukuman yang dicadangkan dalam rang undang-undang ini ialah setimpal dengan kesalahan yang dilakukan kerana jenayah ini melibatkan pengeksploitasian mangsa dari segi seksual, kerja paksa, pemindahan organ manusia dan aktiviti jenayah yang lain. Statistik turut menunjukkan bahawa sebahagian besar mangsa pemerdagangan orang ialah wanita dan kanak-kanak yang diperdaya dan dipaksa melakukan pelacuran. Kebanyakan mangsa terpaksa trauma fizikal, psikjologi dan emosional manakala individu atau sindiket yang melakukan jenayah meraih keuntungan besar daripada pengeksploitasian tersebut. Oleh itu, hukuman berat yang bersifat dengan izin, deterrent adalah diperlukan untuk menangani jenayah ini dengan berkesan.

[36] Fast forward some 12 years later, in 2019 Malaysia was still in Tier 2 of the Watch List as reported in the '2019 Trafficking in Persons Report' issued by the US Department of State. Respectfully, this is a clear indication that very little inroads in tackling human (especially child) trafficking had been made despite the lapse of time since the enactment of the Act. I should think that public interest demands that all stakeholders including the courts to not only merely pay lip service but also take steps to ensure that the law does what it was intended to do.

[37] Likewise for the prostitution of the two adult females, the court could not ignore the fact that with prostitution comes multiple other social ills in particular involving public health and safety.

[38] An imprisonment sentence of say six years would to my mind be only a mere slap on the wrist for the appellant as one third of that six years may be further reduced on remission under s 44(1) of the Prison Act 1995, leaving the appellant to serve about four years and six months only. With respect, this could hardly qualify as a deterrent sentence. With the ten year imprisonment term, even with a one third remission, the appellant was ensured of having to serve at least seven years and six months for the offences under the two charges.

SENTENCE TO BE PROPORTIONATE TO THE OFFENCES?

[39] Learned counsel for the appellant urged this court to take into account the alleged minimal role played by the appellant in the commission of the offences. It was submitted that the appellant was only in charge of delivering food to the victims, maintaining the premises and collecting monies for the ring leaders and that the appellant was never actively involved in soliciting clients for the victims at hand. In support thereof, the appellant cited the case of *Public Prosecutor v Mohamed Danny Mohamed Jedi* [2018] 6 MLJ 383; [2018] 5 CLJ 692.

[40] The Court of Appeal in that case considered the concept of proportionality as explained by the Canadian Supreme Court case of *R v Ipeelee* [2012] SCC13 ; [2012] 1 SLR 433 as follows:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principles serves a limiting or restraining function and ensures justice for the offender.

[41] In the present case, contrary to the contentions by the learned counsel for the appellant, the role played by the appellant was not so minimal as portrayed to be. From the facts of the case tendered and admitted, the appellant also played the role of keeping the victims under control in the house which was raided:

> Ketiga-tiga tertuduh juga berperanan menjaga dan mengawal mangsa di rumah tersebut.

[42] The facts also showed that the appellant was given a capital (*modal*) to start the (prostitution) activities:

> Dua rakan tertuduh iaitu Choong Boon Seng dan Jamlee Bin Joinin ada memberikan dana berupa wang tunai sebagai modal untuk tertuduh James Jeffrey memulakan kegiatan ini.

[43] Further, the monies derived from the prostitution were given to the appellant:

> Sepanjang tempoh tersebut juga, mangsa dikehendaki membuat bayaran RM 300 setiap hari hasil daripada pendapatannya melayani pelanggan kepada tertuduh James Jeffrey sebagai bayaran harian. Sekiranya mangsa gagal mendapatkan pelanggan dan tidak dapat membuat bayaran hari tersebut, ia akan dikira sebagai hutang dan akan di bawa kehadapan sebagai hutang tertunggak.

[44] All of the above pointed to the fact that the appellant's role was more dominant than the other accused persons.

[45] This court was therefore of the view that there was no merit to be had in the submissions by the appellant on this ground.

TREND OF SENTENCING

[46] Learned counsel for the appellant drew this court's attention to the cases *Mohamad Nizam Mohamad Selihin & Anor v Public Prosecutor* [2018] MLJU

1624; [2018] 1 LNS 67 and *Pendakwa Raya v Heng Chun Sim* [2015] MLJU 2345 on the trend of sentencing for cases under s 14 of the Act.

[47] As for the charge under s 372(1)(f) of the Penal Code, the cases *Muhammad Fikri Aslam bin Ishak dan satu lagi lwn Pendakwaraya* [2019] MLJU 772; [2019] 1 LNS 1113 and *Pendakwa Raya v Lee Chee Kien* [2007] MLJU 479; [2007] 1 LNS 370 were cited by the appellant to contend that the trend of sentencing was between three to six years imprisonment.

[48] In *Public Prosecutor v Mohammed Syeed Mallik* [2007] SGCA 48, the Singapore Court of Appeal offered an insight as to how sentencing precedents ought to be considered, holding as follows:

> 85 Further, in assessing the adequacy of a lower court's sentence, due regard may be given to previous sentencing precedents involving similar facts or offences, for the simple reason that these cases give an indication of the appropriate sentence to be imposed. Such precedents are, however, only *guidelines* as each case, of course, ultimately turns on its own facts: see, for example, *Viswanathan Ramachandran v Public Prosecutor* [2003] 3 SLR(R) 435 at [43]. While references to such 'benchmarks' facilitate consistency and fairness by providing a focal point against which subsequent cases with differing degrees of culpability can be accurately determined, *it must be reiterated that benchmarks 'are not cast in stone, nor [do they] represent an abdication of the judicial prerogative to tailor criminal sanctions to the individual offender'* (Emphasis added.): see *Abu Syeed Chowdhury v Public Prosecutor* [2002] 1 SLR(R) 182 at [15].

[49] In *R v Millberry* [2003] 1 Cr App R 396, Lord Woolf commented on the use and limitations of guidelines:

> ... guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double accounting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge to arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.

[50] At home, Jeffrey Tan J (as he then was) in *Sugumaran Kannan v Public Prosecutor* [2007] 3 MLJ 121; [2006] 8 CLJ 644 had this to say:

> The point is that there will be sentences at both the lower and higher end of the range of sentences for any one given offence, and precedents on sentences only serve as guides on the norm. Ultimately, it remains, that each sentence must be individually assessed.

[51] Having regard to the maximum imprisonment terms under the two charges, the age of the child victim, the nature of the offences and more importantly having regard to the intent and object of the Act, this court did not view that it should be constrained to follow the trend of sentencing as in the cases cited by the learned counsel for the appellant. In any event, as noted in para (38) above, at the end of the day, the concurrent imprisonment terms were not manifestly excessive. There was nothing to suggest that the sentences were not in accordance with the law either.

CONCLUSION

[52] In the circumstances, this court saw no reason to disturb the sentences imposed by the sessions court. The appeals were dismissed and the sentences affirmed.

Appeals dismissed.

Reported by Ahmad Ismail Illman Mohd Razali